

1 MICHAEL C. ORMSBY  
2 United States Attorney  
3 Eastern District of Washington  
4 Stephanie Marter  
5 Assistant United States Attorney  
6 Post Office Box 1494  
7 Spokane, WA 99210-1494  
8 Telephone: (509) 353-2767

9 UNITED STATES DISTRICT COURT  
10 EASTERN DISTRICT OF WASHINGTON

11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 vs.

14 ANTHONY E. BURKE,

15 Defendant.

2:06-CR-00113-EFS

MOTION FOR SUBPOENA DUCES  
TECUM

16 Plaintiff, United States of America, by and through Michael C. Ormsby, United  
17 States Attorney, for the Eastern District of Washington, and Stephanie Van Marter,  
18 Assistant United States Attorney for the Eastern District of Washington, pursuant to  
19 Federal Rule of Criminal Procedure, Rules 17 (c)(1), hereby moves for an Order  
20 requiring Western States hospital to produce all the medical records pertaining to the  
21 Defendant.

22 **I. INTRODUCTION AND FACTUAL BACKGROUND**

23 On March 11, 2013, this Court issued an arrest warrant based upon Defendant's  
24 alleged violation of supervised release under this cause number. The basis for the  
25 violation was the Defendant's failure to report to probation after having been released  
26 from federal custody after this court's previous order of revocation. Rather than  
27 reporting back to the Eastern District of Washington (EDWA), the Defendant  
28 remained on the west side of the state where it is alleged that he committed First

1 Degree Murder on or about June 15, 2013. The Defendant was arrested by state  
2 authorities for that Murder offense; as a result, the federal warrant remained active.

3 While in state custody, the Defendant was evaluated for competency to stand  
4 trial.<sup>1</sup> After multiple assessments were completed in the state system between May  
5 2014 and July 2015, on July 16, 2015, the Defendant was civilly committed to the  
6 Psychiatric Treatment and Recovery Center at Western State Hospital pursuant to  
7 RCW 71.05.280(3) and RCW 71.05.290(3)<sup>2</sup>. Based upon that civil commitment, the  
8 state's murder case was dismissed without prejudice.

9 Pursuant to RCW 71.05.290(3) of his civil commitment Order, Western State is  
10 required to file a petition every 180 days recommending whether the Defendant  
11 should remain involuntarily committed to Western State or whether he is eligible for a  
12 less restrictive placement. The United States was advised that on January 11, 2016,  
13 Western States submitted their first 180 day petition which recommended that the  
14 Defendant remain involuntarily committed<sup>3</sup>. That petition expires the end of June  
15 2016.

16 On or about April 7, 2016, the Defendant escaped from Western State Hospital.  
17 The Defendant was located in the EDWA and arrested pursuant to his federal warrant  
18 on April 9, 2016. On April 11, 2016, United States Probation filed a second petition  
19 signed by this Court the same date, alleging a new violation of his supervised release  
20 based upon the commission of a new crime, the First Degree Murder.

21  
22  
23 <sup>1</sup> It is important to note that the Defendant was previously evaluated in federal court  
during his original offense and was found to be competent to stand trial.

24 <sup>2</sup> The basis of Defendant's civil commitment required findings that the Defendant had  
25 committed physical harm against another person; that the offense which was  
26 dismissed was a violent felony offense; that the Defendant was gravely disabled; and  
that there was a substantial likelihood he would repeat similar violent acts.

27 <sup>3</sup> The United States does not have all the medical records from Western State Hospital.  
28 The information as to his recommitment was confirmed by the Washington State  
Attorney General's Office and provided in part to United States Probation Office.

1 Counsel for the Defendant made several oral proffers at the initial appearance  
2 of the Defendant for his arraignment on these petitions. Defense counsel specifically  
3 proffered the state finding that he was not competent to stand trial and that he was  
4 currently under civil commitment. Defense counsel further indicated that he could not  
5 proceed with the arraignment on the current petition based upon concerns of  
6 competency given the Defendant's civil commitment. Judge Hutton continued the  
7 arraignment until April 18, 2016 and further ordered the United States to file a  
8 position as to primary jurisdiction in his matter. The United States filed its position  
9 on April 14, 2016. See, ECF 185.

10 On April 18, 2016, the Defendant was again before Magistrate Court with no  
11 change in status. The Defendant was not arraigned on the petition because the same  
12 issues of competency were present. The matter was therefore set over for hearing  
13 before this Court.

#### 14 **I. LEGAL ARGUMENT**

15 Fed. Rules Crim. P., Rule 17 provides in relevant part:

16 'A subpoena may also command the person to whom it is directed to  
17 produce the books, papers, documents or other objects designated therein.  
18 The court on motion made promptly may quash or modify the subpoena  
19 if compliance would be unreasonable or oppressive. The court may direct  
20 that books, papers, documents or objects designated in the subpoena be  
21 produced before the court at a time prior to the trial or prior to the time  
22 when they are to be offered in evidence and may upon their production  
23 permit the books, papers, documents or objects or portions thereof to be  
24 inspected by the parties and their attorneys.'

25  
26 In *United States v. Nixon*, 418 U.S. 683, 699-700, 94 S. Ct. 3090, 3103, 41 L.  
27 Ed. 2d 1039 (1974), the Supreme Court set forth the following requirements for a  
28 Rule 17 subpoena,

1 [I]n order to require production prior to trial, the moving party must  
2 show: (1) that the documents are evidentiary and relevant; (2) that they  
3 are not otherwise procurable reasonably in advance of trial by exercise of  
4 due diligence; (3) that the party cannot properly prepare for trial without  
5 such production and inspection in advance of trial and that the failure to  
6 obtain such inspection may tend unreasonably to delay the trial; and (4)  
7 that the application is made in good faith and is not intended as a general  
8 ‘fishing expedition.’  
9

10 Therefore, the moving party must establish relevance, admissibility and  
11 specificity. *Id.*

12 Respectfully, the government asks this Court to issue an order requiring  
13 Western State Hospital to produce of all the medical records pertaining to the  
14 Defendant. Defense counsel is unable to obtain a signed release of records from the  
15 Defendant, which is normally the standard procedure in this circumstance. Moreover,  
16 due to the nature of the records, Western State Hospital will not release them absent a  
17 Court Order therefore these records are not otherwise procurable.

18 These records are highly relevant as they directly pertain to the Defendant’s  
19 competency, an issue currently before the Court that must be determined prior to  
20 proceeding in this matter. Additionally, it is not only important of the parties to be  
21 able to review the records to resolve issues of competency, it is even more important  
22 for other assigned medical professionals to have access to these records in order to  
23 properly review his competency. Since Western State Hospital is not a BOP facility, a  
24 Court Order requiring their release will ensure that BOP medical officials will also  
25 have access to the records.

26 Given that that there is a hearing today, the United States’ proposes to address  
27 this motion at the hearing and discuss at that time if any additional protective order  
28 should be put into place for these requested documents. As a result, the United States

1 has not attached proposed order until the issue can be discussed more fully before the  
2 Court and with counsel.

3  
4 Dated: April 21, 2016.

5 MICHAEL C. ORSMBY  
6 United States Attorney

7  
8 s/ Stephanie Van Marter  
9 Stephanie Van Marter  
10 Assistant United States Attorney  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

I hereby certify that on April 21, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Peter S. Schweda, [pschweda@wsmlaw.com](mailto:pschweda@wsmlaw.com)

s/ Stephanie Van Marter  
Stephanie Van Marter  
Assistant United States Attorney